Filed 5/17/07 P. v. Grandberry CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL GRANDBERRY, Defendant and Appellant.	B191688 (Los Angeles County Super. Ct. No. YA061400)

APPEAL from a judgment of the Superior Court of Los Angeles County, Andrew Kauffman, Judge. Affirmed.

Robert Derham, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Michael Grandberry, appeals from the judgment entered following his conviction, by jury trial, for two counts each of attempted premeditated murder, discharging a firearm from a motor vehicle, and assault by means of an assault weapon, with firearm and gang enhancements (Pen. Code, §§ 664/187, 12034, 245, subd. (a)(3), 12022.53, 186.22.)[1] Sentenced to state prison for 78 years to life, Grandberry claims there was trial and sentencing error.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, we find the evidence established the following:

1. *Prosecution evidence.*

On April 7, 2005, D.S. and Z.J. were walking along Imperial Highway when a silver car suddenly crossed over the centerline, approached them and stopped. D.S. saw a gun barrel sticking out of the driver's side window just before multiple shots were fired. The driver was a young black man. D.S. later told police he saw the driver firing an assault weapon.

Z.J. testified he heard brakes screeching and then gunshots, but that he did not see either the car or the people in it. However, immediately after the incident, Z.J. told police he saw a silver compact car swerve across the street toward him and that there were two black men in the car.

D.S. was shot seven times and Z.J. was shot three times.

As it happened, Deputy Sheriffs Fred Jimenez and James North were making a traffic stop nearby when they heard the firing of an assault rifle. Jimenez testified they "immediately turned to where the sound was coming from, and we saw a few people pointing at a car saying 'That's . . . them. That's them.' [¶] And we saw a silver compact car . . . leaving the scene." The officers chased the car; whose occupants were

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[1] All further statutory references are to the Penal Code unless otherwise specified.

two black men. The car crashed into a building. The passenger, later identified as Jason A., got out and fled on foot. Defendant Grandberry, who had been driving, was detained. After a search of the surrounding neighborhood, Jason was apprehended.

Inside Grandberry's car, the officers found an assault rifle with a banana clip holding 15 live rounds. The clip's capacity was 30 rounds. There were several expended shells in and around the car. There were also expended shell casings at the scene of the shooting. The assault rifle was a 40-inch long Russian S.K.S. semiautomatic rifle, which is illegal in California. Tests showed the expended shells found at the shooting scene had been fired from this assault rifle. A gunshot residue test found two particles unique to gunshot primer residue on Grandberry's hand. A gunshot residue test performed on Jason was negative.

Grandberry and Jason were members of the Raymond Avenue Crips gang. Detective Michael Valento, the prosecution gang expert, testified the Raymond Avenue Crips and the Denver Lane Bloods were bitter rivals who assaulted each other at every opportunity. The section of Imperial Highway where the shooting occurred was in Denver Lane Bloods territory, and the street Grandberry took after the shooting marked the border between Denver Lane and Raymond Avenue territory. Given a hypothetical question based on the facts of this case, Valento opined the shooting had been gang-related.

2. *Defense evidence.*

Grandberry did not testify.

An officer described how Jason had been apprehended after running into a nearby house and hiding under a bed. He testified that, when Jason was brought out of the house, Officers Jimenez and North identified him as having been the passenger in the silver car.

North testified the assault rifle in Grandberry's car had been found with its butt on the passenger side, but that the rifle was leaning against the center console and pointing toward the driver's seat.

The defense gang expert testified street gangs typically were not well organized and that most gang offenses occurred spontaneously. Given a hypothetical question based on the facts of this case, the expert opined the shooting had not been gang-related because there was no evidence gang signs had been displayed or the question "Where are you from?" uttered.

CONTENTIONS

1. The trial court erroneously denied Grandberry's *Marsden* motions.

2. Defense counsel was ineffective for failing to object to testimony from the prosecution gang expert.

3. Grandberry's sentence constitutes cruel and unusual punishment.

DISCUSSION

1. *Grandberry's Marsden motions were properly denied.*

Grandberry contends the trial court abused its discretion by refusing to discharge appointed counsel after Grandberry complained about him numerous times. This claim is meritless.

a. *Legal principles*.

"*Marsden* motions are subject to the following well-established rules. ' " 'When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations].' [Citations.]" ' " (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)

A bare assertion of inadequate representation is insufficient to require appointment of new counsel; the defendant must make a substantial showing. (*People v. Crandell* (1988) 46 Cal.3d 833, 859, disapproved on other grounds by *People v. Crayton* (2002) 28 Cal.4th 346, 364.) Simply because a defendant does not like or think highly of his

attorney does not compel a substitution of counsel. (*People v. Memro* (1995) 11 Cal.4th 786, 857.) "Moreover, '[a] trial court is not required to conclude that an *irreconcilable* conflict exists if the defendant has not made a sustained good faith effort to work out any disagreements with counsel and has not given counsel a fair opportunity to demonstrate trustworthiness.' [Citation.]" (*People v. Barnett, supra,* 17 Cal.4th at p. 1086.) " ' "[I]f a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law." ' [Citation.]" (*People v. Memro, supra,* at p. 857.)

"Denials of *Marsden* motions are reviewed under an abuse of discretion standard. [Citation.] Denial 'is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would "substantially impair" the defendant's right to assistance of counsel. [Citations.]' [Citation.]" (*People v. Barnett, supra,* 17 Cal.4th at p. 1085.)

b. *Analysis.*

Grandberry claims the attorney-client relationship had so deteriorated that ineffective assistance of counsel was likely to result. He argues, "Although neither infrequency of visits by counsel [citation] nor a defendant's general mistrust of counsel [citation] are sufficient, without more, to require the discharge of counsel, where the record indicates that such factors have significantly impaired the relationship and communication between attorney and client, substitution of counsel is necessary. Here, the record shows that appellant and his court-appointed attorney were at odds from the very beginning. Counsel agreed that the two disagreed on the approach to the case, and corroborated appellant's claim that they argued continuously. The deterioration in the attorney-client relationship was made perfectly clear when appellant called his attorney a 'liar.' "

We note, preliminarily, that there is no question the trial court gave Grandberry ample opportunity to air his complaints. *Marsden* hearings were held on four different

dates between October 3, 2005 and February 17, 2006. If Grandberry and defense counsel were at odds "from the very beginning," the record demonstrates the problems were being caused by Grandberry, who was unhappy defense counsel was a public defender. The very first thing Grandberry said at the first *Marsden* hearing was, "I kept in court with this lawyer right here. He tell me that he's a state attorney. Come to find out he's a public defender." During the last *Marsden* hearing, Grandberry said: "So I don't need [him] to be my lawyer at all, not one bit. I need me a state attorney . . . ," and "I want to get rid of the dude. That's it. I want a state attorney." Grandberry several times voiced paranoid suspicions about defense counsel's loyalty, but he also acknowledged that, to some degree, he had just been taking his frustrations out on counsel.[2]

Grandberry complained defense counsel had not communicated with him enough and had failed to prepare motions Grandberry wanted to file, but these issues were resolved by the trial court. Grandberry's primary concerns were tactical. He wanted to call Jason as a witness, despite defense counsel's representation to the trial court that Jason was likely to give incriminating testimony. There was unhappiness with defense counsel's advice that Grandberry not take the stand given the implausibility of his proposed testimony and the prior convictions that would be used to impeach him. (See *People v. Dickey* (2005) 35 Cal.4th 884, 922 ["We do not find *Marsden* error where complaints of counsel's inadequacy involve tactical disagreements."].) Despite defense counsel's explanation about accomplice liability, Grandberry seemed unwilling to believe he could be convicted even if the jury believed he had merely been driving the car.

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[2] Grandberry's paranoia was manifested by statements like: "I saw the letters and all that. . . . He showed them to the other judge or not, or he's working with the D.A. I don't know."; "[M]e and him having a problem, and I feel he workin' for the D.A."; and "So it's, like, he tryin' to work for the D.A. or trying to get me." Grandberry also conceded: "And I just go off on him because he don't – the only one I can talk and I don't about my case to somebody else. [¶] So I see him. It just be like I take my frustrations out on him but – "

Defense counsel denied Grandberry's assertion they had been arguing continuously, although he acknowledged they had occasionally exchanged harsh words. Grandberry called defense counsel a liar in response to counsel's denial he had ever said he couldn't wait for Grandberry to be convicted. Defense counsel said he told Grandberry "that, if he were to take the stand and to testify and to tell the jury the story that he told me, that I would anticipate that he would be convicted . . . ." The trial court was entitled to believe defense counsel's version of this incident. (See *People v. Jones* (2003) 29 Cal.4th 1229, 1245 [trial court may judge credibility at *Marsden* hearing].) Defense counsel told the trial court that, even though his relationship with Grandberry had been punctuated by some bad interactions, he was fully prepared to represent Grandberry at trial.

" 'Denial of the [*Marsden*] motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would "substantially impair" the defendant's right to assistance of counsel' " (*People v. Horton* (1995) 11 Cal.4th 1068, 1102), i.e., unless the defendant has "demonstrate[d] either inadequate representation or irreconcilable conflict" (*People v. Jones*, *supra*, 29 Cal.4th at p. 1245.) Grandberry failed to make such a showing. The record demonstrates defense counsel was willing and able to represent Grandberry's interests competently, which included a duty to objectively assess Grandberry's situation and prepare a trial strategy based on that assessment. The trial court gave Grandberry repeated opportunities to voice his concerns, and the trial court reasonably found Grandberry's complaints were insufficiently credible to warrant substitution of counsel. (See *People v. Barnett*, *supra*, 17 Cal.4th at pp. 1086, 1092 [*Marsden* motions properly denied where trial court gave both defendant and counsel ample opportunity to be heard, counsel had met with defendant and was prepared to proceed, record showed strategy disagreements but no inadequate representation, record showed defendant's frustration with counsel but also counsel's readiness to proceed].)

The trial court did not abuse its discretion by denying Grandberry's *Marsden* motions.

2. *Defense counsel was not incompetent for failing to object to expert testimony.*

Grandberry contends defense counsel was ineffective for failing to object to the prosecution gang expert's testimony that the shooting had been gang-related. This claim is meritless.

a. *Legal principles*.

" 'To establish ineffective assistance, defendant bears the burden of showing, first, that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him.' [Citation.] 'If the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation.' [Citation.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052-1053.) "In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny" in order to avoid "the adverse consequences that systematic 'second-guessing' might have on the quality of legal representation provided to criminal defendants and on the functioning of the criminal justice system itself." (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.)

"[E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation – including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like – can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*People v. Hernandez*, *supra*, 33 Cal.4th at p. 1049; see also *People v. Avitia* (2005) 127 Cal.App.4th 185, 192 ["Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative."].)

b. *Analysis.*

Here, the gang evidence was relevant to prove Grandberry's motive for committing an otherwise inexplicable shooting. (See *People v. Ruiz* (1998) 62 Cal.App.4th 234, 239 [notwithstanding potential prejudicial effect of gang evidence, such evidence admissible "when the very reason for the crime is gang related"]; *People v. Martin* (1994) 23 Cal.App.4th 76, 81 ["where evidence of gang activity or membership is important to the motive, it can be introduced even if prejudicial"].)

We disagree with Grandberry's argument the prosecution gang expert's testimony could have been successfully excluded under *People v. Killebrew* (2002) 103 Cal.App.4th 644. "A gang expert may render an opinion that facts assumed to be true in a hypothetical question present a 'classic' example of gang-related activity, so long as the hypothetical is rooted in facts shown by the evidence. [Citation.]" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551, fn. 4.) The expert in *Killebrew*, instead of testifying what a hypothetical gang member would typically have done in the circumstances shown by the evidence, "testified that when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess" it. (*People v. Killebrew*, *supra*, at p. 652.)

Told to assume facts reflecting what the evidence had shown, the prosecution expert Valento was asked if, in his opinion, this "type of behavior [would] benefit the Raymond Avenue Crips[.]" Valento said yes, explaining: "[T]hey go into rival gang territory and assaulted who they believe are Denver Lane Blood gang members simply because they are young African-Americans walking in their gang territory. This upholds the reputation [that] they go at any time and use violence against" the Denver Lane Bloods. The following colloquy then occurred:

"Q Now, does it affect your opinion at all that the victims were not Denver Lane Bloods?

"A No.

"Q Why?

"A As I stated earlier, they were two young African-Americans in gang territory,

and in my opinion, they assumed just simply based on that fact that they were gang members from the Denver Lane Bloods."

Grandberry asserts Valento was not asked "a hypothetical" and, therefore, his response was "direct testimony from an 'expert' of what was on appellant's mind at the time of the crime." We disagree. The prosecutor prefaced the initial question by saying, "Now, with regard to this particular case, *assuming for a moment* that . . . ," then summarized the evidence, and then asked: "[W]ould that type of behavior benefit the Raymond Avenue Crips?" (Italics added.) The prosecutor followed up the initial hypothetical question by asking Valento to assume the victims were not, in fact, gang members.

"A gang expert may render an opinion that facts assumed to be true in a hypothetical question present a 'classic' example of gang-related activity, so long as the hypothetical is rooted in facts shown by the evidence. [Citation.]" (*People v. Gonzalez, supra,* 126 Cal.App.4th at p. 1551, fn. 4.) This is true even if the gang expert's opinion in effect answers an ultimate issue in the case. "Appellant's reliance on *Killebrew* for a contrary conclusion is misplaced. In *Killebrew*, in response to hypothetical questions, the People's gang expert exceeded the permissible scope of expert testimony by opining on 'the subjective *knowledge and intent* of each' of the gang members involved in the crime. [Citation.] Specifically, he testified that each of the individuals in a caravan of three cars knew there was a gun in the Chevrolet and a gun in the Mazda and jointly possessed the gun with everyone else in the three cars for mutual protection. [Citation.] *Killebrew* does not preclude the prosecution from eliciting expert testimony to provide the jury with information from which the jury may infer the motive for a crime or the perpetrator's intent; *Killebrew* prohibits an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial." (*Id.* at pp. 1550-1551.) "Obviously, there is a difference between testifying about specific persons and about hypothetical persons. It would be incorrect to read *Killebrew* as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons. . . . [U]se of hypothetical questions is proper." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946, fn. 3.)

Grandberry argues "[n]one of the testimony was necessary to the jury's understanding of the evidence; it was instead simply the individual opinion of Deputy Valento as to how the jury should decide the issue." At the same time, however, he asserts "the evidence that these crimes were committed 'for the benefit of' a criminal street gang is woefully weak. In truth, there is no evidence whatsoever of the motive behind these crimes." But that is why gang evidence like this is allowed; without it, the jury might not believe Grandberry had a motive for participating in the shooting of two victims who did not belong to a rival gang.[3]

Defense counsel was not incompetent for failing to object to testimony that was properly admitted.

3. *Grandberry's sentence was not cruel and unusual.*

Grandberry contends his sentence of 78 years to life amounted to cruel and unusual punishment under both the California and the United States Constitutions. This claim is meritless.

Grandberry has not demonstrated his sentence was disproportionate to his crime or to his individual culpability, or excessive when compared to the punishment imposed for more serious offenses. (See *People v. Dillon* (1983) 34 Cal.3d 441, 477-482; *In re Lynch* (1972) 8 Cal.3d 410, 423-424.) Our Supreme Court has emphasized "the considerable burden a defendant must overcome in challenging a penalty as cruel or unusual. The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the Legislature. Perhaps foremost among these are the definition of crime and the determination of punishment. [Citations.] While these intrinsically legislative functions

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[3] Grandberry's own gang expert, in answer to defense counsel's similar hypothetical question, gave an opinion exactly opposite from Valento. The defense expert opined the shooting had not been gang-related for the following reasons: "[I]t's apparently an individualistic attack out of some kind of sudden rage"; "It appears to be a spontaneous act"; and, "They were not in a gang context, out to get anyone from another gang. And that the individuals [i.e., the victims] were apparently not in a rival gang."

are circumscribed by the constitutional limits of article I, section 17, the validity of enactments will not be questioned 'unless their unconstitutionality clearly, positively, and unmistakably appears.' [Citation.]" (*People v. Wingo* (1975) 14 Cal.3d 169, 174, fn. omitted.)

The length of Grandberry's sentence alone does not warrant relief. (See *Harmelin v. Michigan* (1991) 501 U.S. 957 [115 L.Ed.2d 836] [mandatory LWOP sentence for possessing more than 650 grams cocaine did not violate Eighth Amendment].) The sole fact Grandberry's sentence may be, in effect, one for life without possibility of parole does not render it unconstitutional. (See *People v. Ayon* (1996) 46 Cal.App.4th 385, 396, disapproved on other grounds by *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10 [sentence of 240 years to life not unconstitutional].)

Grandberry's criminal record includes the following offenses: a juvenile petition sustained for having possession of a concealable firearm and live ammunition; an adult conviction in 1999 for attempted murder[4]; an adult conviction in 2003 for infliction of corporal injury on a spouse. Grandberry asserts the consequences of his crime were not serious because the victims were not seriously injured, ignoring the fact both victims easily could have been killed had the gunman's aim been better. Grandberry notes the jury did not convict him of being the gunman, but he concedes evidence showed he "drove the car, and drove it close to the victims, presumably to allow the shooter an opportunity to fire at them."

Grandberry has not demonstrated his sentence constituted cruel and unusual punishment.

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4 In that case, Grandberry apparently shot the victim in the face as an entirely gratuitous denouement to an already successful robbery.

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.